

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GUSTAVO HERNANDEZ,

Case No. 3:22-cv-00304-ART-CLB

Plaintiff,

ORDER

v.

KERRY EARLEY,

Defendant.

Pro se Plaintiff Gustavo Hernandez brings this action under 42 U.S.C. § 1983. Before the Court is the Report and Recommendation (“R&R” or “Recommendation”) of United States Magistrate Judge Carla Baldwin (ECF No. 9), recommending that this action be dismissed without prejudice and without leave to amend as Plaintiff challenges the constitutionality of his state court conviction, making a *habeas corpus* action appropriate and a § 1983 action inappropriate. Plaintiff timely filed an objection. (ECF No. 10.) As explained below, the Court adopts the R&R, and will dismiss this case without prejudice and without leave to amend and deny Plaintiff’s application to proceed *in forma pauperis* as moot.

The Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Here, Judge Baldwin recommends dismissal of this action without prejudice and without leave to amend because Plaintiff brings challenges to the adequacy of the proceedings in state court, which are proper subjects for a *habeas corpus* action and not a § 1983 action pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). (ECF No. 9 at 4.) Having reviewed Plaintiff’s complaint, the Court agrees with Judge Baldwin. Plaintiff brings three claims of “court negligence” stemming from the alleged failure of the state court to enter his sentence on the docket. (ECF No.

1 1-1 at 2-5.) This is a challenge to an underlying state court proceeding
2 appropriate for a *habeas corpus* action.

3 In Plaintiff's objection, Plaintiff acknowledges that his action was initiated
4 in error and requests leave to amend. (ECF No. 10 at 2.) However, as Judge
5 Baldwin noted, Plaintiff had not been assessed a filing fee in this case. As such,
6 Plaintiff will not be prejudiced by being required to file a proper action.

7 Having reviewed the R&R and the record in this case, the Court will adopt
8 the R&R in full.

9 It is therefore ordered that Judge Baldwin's Report and Recommendation
10 (ECF No. 9) is accepted and adopted in full.

11 It is further ordered that Plaintiff's application to proceed *in forma pauperis*
12 (ECF No. 1) be denied as moot.

13 It is further ordered that the Clerk file Plaintiff's complaint (ECF No. 1-1).

14 It is further ordered that Plaintiff's complaint be dismissed without
15 prejudice and without leave to amend.

16 The Clerk of Court is directed to administratively close this case.

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19 DATED THIS 10th day of July 2023.

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23 ANNE R. TRAUM
24 UNITED STATES DISTRICT JUDGE
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